Filed 11/24/15 Gens v. Hopkins & Carley CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

TIMOTHY GENS, Plaintiff and Appellant, v. HOPKINS & CARLEY, ET. AL., Defendants and Respondents.	H039550 (Santa Clara County Super. Ct. No. 1-07-CV090225)

Plaintiff Timothy Gens appeals from an order confirming an arbitration award in his malpractice action against Hopkins and Carley (H&C), the law firm that had previously represented him, and two of the attorneys at the firm. Gens contends that arbitration should not have been ordered because the entire retainer agreement containing the arbitration clause was illegal and void. He further challenges the subsequent order and judgment confirming the award on the ground that two of the arbitrators had fraudulently misrepresented their qualifications. We find no merit whatsoever in these arguments and therefore affirm the judgment.

Background

Gens and H&C have been embroiled in litigation since 2006, but their legal relationship goes back to 2002. Gens was then president and chief executive officer of L-Tech Corporation (L-Tech), the shares of which he owned equally with Gary Ferrell. In May 2002 H&C agreed to represent L-Tech in a merger into SEZ America, a subsidiary of SEZ Holding Ltd. Gens signed the "Professional Services Agreement" on

behalf of L-Tech, which was identified in the document as H&C's client. One outcome of the eventual merger was the employment of Gens and Ferrell by SEZ Holding AG (SEZ).

A dispute thereafter arose between Gens and both Ferrell and SEZ. Gens again consulted with H&C, resulting in another professional services agreement, signed in March 2004. In that document H&C agreed to advise Gens "with respect to a potential dispute with Gary Ferrell and [SEZ], including the possibility of litigation with one or both." In December 2004 William Klein, one of the shareholders of H&C, wrote to Gens outlining the challenges they faced against Ferrell and SEZ, including their assertion that H&C should be disqualified because of the past representation of L-Tech in the merger with SEZ. H&C had successfully opposed Ferrell's disqualification motion, but the outcome of SEZ's effort was uncertain, even though Klein believed that H&C had a "good faith basis" for continuing to represent Gens. To avoid the disqualification issue, Klein offered Gens the alternative of either hiring new counsel to represent him or representing himself. Gens led Klein to understand that he wished H&C to continue working on his behalf. Ultimately, H&C did file a complaint on Gens's behalf against Ferrell, but it declined to represent Gens against SEZ. Gens then proceeded in propria persona against various SEZ entities. According to the parties, the Ferrell lawsuit ended in a mistrial after Ferrell committed suicide. H&C thereafter withdrew from representing Gens.

Paragraph No. 12 of the March 10, 2004 "Professional Services Agreement" obligated the parties to submit any dispute, "including fee disputes or claims of legal malpractice," to binding arbitration. Indeed, a dispute did arise when Gens refused to pay H&C's bills, which amounted to over $400,000 by May of 2006. H&C demanded arbitration, and on January 23, 2007, the arbitrator awarded H&C $474,061.56, plus interest, as well as $6,950.00 for arbitration fees and expenses.

The superior court confirmed that award by a judgment entered on June 5, 2007. Two weeks later the court denied Gens's motion to vacate the arbitrator's award.

In July 2007 Gens filed a complaint in propria persona against H&C and four of its attorneys, asserting causes of action for professional negligence, breach of fiduciary duty, misrepresentation, and fraud.[1] Among his allegations was defendants' failure to disclose that they "were in a conflict of interest that precluded them from effectively representing plaintiff." In January 2008 Gens filed a first amended complaint which added a claim for equitable relief from the June 5, 2007 judgment, based in part on defendants' "grievous and material breach of their obligations to have disclosed and obtained a written waiver of conflicts of interest." For the same reason, Gens alleged, the retainer agreement was "illegal and void."

By this time Gens, through new counsel, had already filed a motion under Code of Civil Procedure section 473[2] for relief from the June 2007 judgment confirming the arbitration award. The motion was denied on January 30, 2008, and on November 21, 2011, this court affirmed that order, as well as a separate order imposing sanctions on Gens and his attorneys for bringing the meritless section 473 motion. (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401 (*Hopkins & Carley*); *Hopkins & Carley v. Gens* (Nov. 21, 2011, H032780) [nonpub. opn.].)

In March 2008 H&C and its attorneys petitioned to compel arbitration of Gens's malpractice complaint. Gens opposed the petition, again asserting that the retainer agreement was "illegal and void" because of H&C's failure to disclose its conflict of

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[1] Nine days earlier H&C had filed a complaint against Gens and his wife, alleging that Gens had fraudulently transferred his interest in community property without consideration, "with the intent to hinder, delay or defraud collection of the [June 5, 2007] Judgment by placing the property outside the reach of plaintiff's efforts to enforce the Judgment against Mr. Gens."

[2] All further statutory references are to the Code of Civil Procedure.

interest. According to Gens, Ferrell was a former client, SEZ had succeeded to the firm's former client (L-Tech), and H&C had "failed to get written consent from either former client" or to disclose to Gens "fully in writing" the "reasonably foreseeable adverse consequences of its suing Ferrell and SEZ for him when it had represented them in the past." Because H&C was "ethically barred" from representing Gens, the retainer agreement "was and is illegal, and the arbitration clause within it is unenforceable." In their reply defendants asserted that "the issues of legality and validity" of the agreement were barred by the doctrine of res judicata. They also argued that Gens could not establish illegality because H&C had no conflicts of interest and had not violated any rules of professional conduct.

The superior court granted defendants' petition on June 9, 2008. The parties eventually selected a three-member panel of the American Arbitration Association. The arbitrators rendered summary judgment in defendants' favor on May 2, 2012, and transmitted that decision to the parties on May 30, 2012. On December 18, 2012, defendants petitioned to confirm this award.

Gens, who had substituted himself in pro per for his former counsel six months earlier, opposed the petition. Gens's primary argument was that two of the panelists had misrepresented their qualifications to serve as arbitrators, because each had previously spent time as an inactive member of the California State Bar. The "ensuing lack of competency" concealed by this "fraud," Gens contended, "affected their ability to fairly rule in this case." Gens also asserted that at least one of the panelists had inadequately performed his duty and had exceeded his authority, because the billing records indicated (to Gens) that the panelist had failed to engage in legal research or review the cases and records submitted to the panel.

The superior court granted defendants' petition on March 21, 2013, and entered judgment confirming the award that day. Gens then filed this appeal.[3]

Discussion

In challenging the 2013 judgment, Gens contends, for at least the sixth time, that the "Professional Services Agreement" was "void" due to H&C's conflict of interest. In *Hopkins & Carley*, this court considered the same argument in the context of Gens's appeal from the order denying him relief from the judgment resulting from the first arbitration award. In moving for that relief in December 2007, Gens had argued, among other things, that "[H&C] had an absolute obligation to make a written disclosure to Mr. Gens of both its relationship to SEZ and the duties it owed the company. It could not undertake or continue the representation of Mr. Gens without his informed written consent about the conflict. In the absence of such consent, [H&C] was entitled to no fee, and indeed must disgorge all fees it has been paid."

Gens's argument in *Hopkins & Carley* failed to convince this court that error had occurred in the denial of his section 473 motion. Among the points we made was Gens's failure to identify a mistake of fact that could support relief. At best he had claimed that he "did not understand that the firm had had conflicts of interests when it signed the retainer agreement and represented me, and I did not know that those conflicts barred it from recovering fees from me. If I had known, I would have raised the conflicts as a defense to Hopkins & Carley's petition. I mistakenly did not raise this defense to the petition." (*Hopkins & Carley*, *supra*, 200 Cal.App.4th at p. 1411, italics omitted.) Gens, however, appeared to know "as much about relevant matters as anyone"; indeed, we

[3] Gens appealed from the judgment and purported to appeal from the earlier order granting the petition to compel arbitration. An order granting a motion to compel arbitration is not appealable, but it may be reviewed on appeal from a subsequent judgment on the award. (§§ 1294 & 1294.2; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648-649.)

found the inference "inescapable" that Gens "knew all the facts from which the alleged conflict of interest arose. (*Id*. at p. 1412.) Thus, the claim of mistake, properly viewed, was a "failure by Gens to 'realize' that the facts *he already knew* supported a claim that H&C had committed an ethical violation barring it from recovering for its services. This of course would be ignorance of law, not of fact." (*Ibid*., italics added.)

We further recognized in *Hopkins & Carley* that Gens's failure to discover his defense must be regarded as inexcusable neglect, since Gens, a lawyer, "must be charged with knowledge both of the limits of his own competence as an attorney and of the means to enlarge his understanding. His inexcusable negligence as an attorney must be imputed to him as a client." (*Hopkins & Carley supra*, 200 Cal.App.4th at p. 1415.) Even aside from his status as a lawyer, Gens's decision to represent himself did not excuse his failure to present the conflict-of-interest defense until he procured counsel, because he had shown no excuse for belatedly retaining counsel. We noted that "[t]he law does not entitle a party to proceed experimentally without counsel and then turn back the clock if the experiment yields an adverse result. One who voluntarily represents himself 'is not, for that reason, entitled to any more (or less) consideration than a lawyer. Thus, any alleged ignorance of legal matters or failure to properly represent himself can hardly constitute "mistake, inadvertence, surprise or excusable neglect" as those terms are used in section 473.' [Citation.] Rather, 'when a litigant accepts the risks of proceeding without counsel, he or she is stuck with the outcome, and has no greater opportunity to cast off an unfavorable judgment than he or she would if represented by counsel.' [Citation.] Here . . . when Gens claims to have made a mistake of law, 'what he really means is not that he made a mistake of law when he attempted to put on his case at trial, but that he made a mistake in judgment when he chose to act as his own attorney.' " (*Id*. at pp. 1413-1414.)

Gens's position fares no better when examined in the context of his own action against H&C. He rapidly alternates between claiming that the retainer agreement is void

and asserting only that it is voidable. He assumes that a conflict of interest actually existed, based on his view of the relationship between H&C and L-Tech, Ferrell, and SEZ. Armed with that faulty premise, he insists that the retainer agreement between H&C and him was illegal and should not have been subjected to arbitration.

1. *Order Granting Petition to Compel Arbitration*

The Legislature has set forth a "comprehensive statutory scheme" through which it "has expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' . . . Consequently, courts will ' "indulge every intendment to give effect to such proceedings." ' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*).) In particular, section 1281.2 states in part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement. [¶] . . . [¶] If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit."

In accordance with this provision, arbitration agreements are generally enforceable, "except when legal or equitable grounds exist to void a contract." (*Chin v. Advanced Fresh Concepts Franchise Corp*. (2011) 194 Cal.App.4th 704, 708.) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 972; *Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413.) If the court has doubts

regarding the applicability of an arbitration clause, those doubts should be resolved in favor of arbitration. (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 652.) The parties should therefore be ordered to arbitrate " 'unless it is clear that the arbitration clause cannot be interpreted to cover the dispute.' " (*Ibid.*)

Contrary to both parties' respective positions, appellate review is for substantial evidence if the trial court's decision on arbitrability was based upon the resolution of disputed facts, while de novo review is appropriate if there was no conflicting extrinsic evidence presented. (*Hartnell Community College Dist. v. Superior Court* (2004) 124 Cal.App.4th 1443, 1448-1449; *Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 685.) Here the evidence was essentially undisputed; consequently, we will apply an independent standard to the superior court's ruling on the petition.

The order, however, was entirely justified. Even without applying res judicata principles as defendants urge, we reject the premise of Gens's voidness claim, that a conflict of interest ethically prevented H&C from representing Gens for any purpose.[4] Gens's position depends on the assumption that H&C's "ethical breach" was in failing to "make a written disclosure to Mr. Gens of the relevant circumstances of its conflict of interests and to advise him in writing of the reasonably foreseeable adverse consequences to him of retaining the firm." As we discussed in *Hopkins & Carley*, however, there were no facts of which Gens was unaware: "On the contrary it appears that he knew as much about relevant matters as anyone. In his supporting declaration below he asserted the

[4] Gens misunderstands the relevance of res judicata here in any event. He imagines that "[t]he question before the court is, thus, the following: will the court find that Mr. Gens's failure to raise the defense of illegality in an earlier proceeding now somehow bars him from raising the defense now?" We are not considering any defenses in this appeal; it is Gens's own action that is before us.

existence of an ethical obligation . . . based entirely on H&C's 'handling [of] the L-Tech/SEZ merger.' In his brief here [and again, in this second appeal,] he asserts that H&C had ethical duties to 'SEZ as the successor to L-Tech.' So far as this record shows, Gens knew all about the merger, and SEZ's succession to L-Tech's rights and privileges, when those things occurred. He declared in 2004 that it was he who, on behalf of L-Tech, engaged H&C in 2002. He went on to state that he 'was the only L-Tech representative to communicate with H&C attorneys' in connection with the transaction. The inference thus seems inescapable that long before judgment was entered in this matter, Gens knew all the facts from which the alleged conflict of interest arose." (*Hopkins & Carley*, *supra*, 200 Cal.App.4th at p. 1412.)

We do not know how to make it any clearer: There is no factual basis for finding an actionable failure to disclose facts that Gens already knew. Gens had every opportunity to reconsider and decline representation by H&C; if he failed to consider a possible conflict of interest, it was due to his own "*inexcusable* neglect," as he was an attorney himself. (*Hopkins & Carley*, *supra*, 200 Cal.App.4th at p. 1414.) The asserted lack of "informed consent and written waiver" of any conflict cannot be deemed to have injured Gens in light of the circumstances presented.[5] There being no factual or legal foundation for Gens's assertion that the retainer agreement was void, the causes of action in Gens's first amended complaint were properly sent to arbitration.

[5] Gens's underlying assertion of conflict in H&C's representing him against SEZ is without merit in any event. H&C represented L-Tech, not Ferrell, in the original litigation. Klein, anticipating a costly battle against the "aggressive litigation style" of both Ferrell and SEZ, had invited Gens to obtain different counsel. Gens, however, expressed a preference for continued representation by H&C. H&C did not represent Gens in his lawsuit against SEZ; he represented himself.

2. *Order Confirming the Award*

Gens next renews his contention that defendants' petition to confirm the May 2, 2012 arbitration award should have been denied because the award was procured by "corruption, fraud or other undue means," within the meaning of section 1286.2, subdivision (a)(1).

As noted earlier, the claimed "fraud" consisted in two of the arbitration panelists having provided resumes that omitted a gap in their California State Bar membership. The resume for the Honorable Carl West Anderson indicated that he had served as a mediator and arbitrator since 1997, and a page from judicatewest.com listed his experience as "Arbitrator, Mediator & Private Judge" from 1989 to the present. In a declaration supporting his opposition to the petition to confirm the award, Gens stated that in February 2013 he contacted the Bar and learned that Justice Anderson had been an inactive member of the Bar from January 2002 until March 2006. William A. Quinby's resume indicated self-employment as a mediator and arbitrator from "1996-present." Gens's contact at the Bar reported that Mr. Quinby was inactive from January 2001 until January 2006. As Gens misleadingly concludes, this means that the two panelists "were both ineligible to practice law for a total of over nine years."

Gens's contention fails for multiple reasons. First, his opposition was untimely. "When one side files a petition to confirm the award, the other side must respond within 10 days." (Code of Civ. Proc. §1290.6; *Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 66.) Defendants filed and served their petition by December 18, 2012. Gens, however, did not oppose defendants' petition until February 14, 2013; his excuse[6] was evidently rejected by the superior court in the exercise of its discretion.

[6] Gens's excuse was that his paralegal had "incorrectly marked" his calendar "to file the opposition nine calendar days from the hearing and not court days." Gens thus appears to have been aware of the statutory deadline.

Second, there was no legal justification for denying defendants' petition, because the allegation of corruption and fraud was without merit. Gens's assertion to the contrary was based on no evidence other than what someone from the State Bar told him about the panelists' membership status. That was unquestionably hearsay. Third, Gens offered no excuse for his delay in discovering the asserted gap in Bar membership status until February 2013. Fourth, even if Gens's argument were cognizable, there was no factual basis for finding fraud or corruption, as all three panelists were active members of the Bar when they conducted this arbitration in 2012. Fifth, Gens made no showing of prejudice—that is, no showing that the alleged gap in active membership status affected the challenged panelists' ability more than six years later to conduct arbitration and render an award that was well reasoned and legally sound.[7] Equally meritless is Gens's speculative and legally unsupportable suggestion that the billing records for the arbitration indicate that "at least one panelist ignored the briefs" and performed no legal research. Even if this were a valid attack on an arbitration decision, no evidence exists that the arbitrators gave Gens's position any less consideration than it deserved. In short, Gens's attempt to discredit the arbitrators utterly fails.

Disposition

The judgment is affirmed.

[7] Of course, neither the factual findings nor the validity of the reasoning underlying an arbitrator's decision is generally subject to judicial review. (*Moncharsh, supra*, 3 Cal.4th at p. 11.)

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

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